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SUPREME COURT, U.S.

NO. 82-6433

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LEVIS LEON ALDRIDGE,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

ISSUE I

WHETHER THE DEFENDANT BELOW, AFTER HAVING ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEMONSTRATED ANY PREJUDICE FROM THE REPRESENTATION AFFORDED TO HIM BY HIS APPOINTED COUNSEL.

ISSUE II

WHETHER PETITIONER'S ISSUE CONCERNING THE FLORIDA SUPREME COURT'S APPLICATION OF THE ELLEDGE RULE, CANNOT BE CONSIDERED BY THIS COURT FOR A FAILURE OF JURISDICTION.

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OPINION BELOW

The opinion of the Supreme Court of the State of Florida which is sought to be reviewed is reported as Levis Leon Aldridge v. State, 425 So.2d 1132 (Fla. 1982).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) and to the extent that a substantial federal question was properly raised by petitioner and disposed of by the Florida Supreme Court this Court has jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves § 921.141, Florida Statutes (1977).

STATEMENT OF THE CASE

Respondent accepts the petitioner's Statement of the Case insofar as it deals with the procedural setting of the cause, but must take exception to the lengthy recounting of testimony presented at the evidentiary hearing.

The state courts did not find the various "facts" recounted by petitioner. Petitioner has selectively chosen those portions of the evidence which state the facts in a light most favorable to his case.

The State of Florida would urge this Court to accept the Statement of Facts in the opinion of the Florida Supreme Court as those presently before this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

ISSUE I

WHETHER THE DEFENDANT BELOW, AFTER HAVING ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEMONSTRATED ANY PREJUDICE FROM THE REPRESENTATION AFFORDED TO HIM BY HIS APPOINTED COUNSEL.

Petitioner comes before this Court with the request that a writ of certiorari issue to the Supreme Court of Florida. In his two-part petition, petitioner first alleges that the standard of prejudice applied by the Florida courts in the analysis of his ineffective assistance of counsel claim, deprived him of rights secured by the United States Constitution. Additionally, petitioner complains that the review by the Florida Supreme Court on direct appeal from his conviction and death sentence, was violative of his federally-protected constitutional rights.

Respondent agrees with the petitioner's case insofar as it is obvious from a reading of Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), that the prejudice standard therein is substantially different from that found in Knight v. State, 394 So.2d 997 (Fla. 1981). In Knight, the Florida Supreme Court set a four-step process by which a defendant's claim of ineffective assistance of counsel should be examined. The third step in this four-step process is as follows:

> Third, the defendant has the burden to show that this specific serious deficiency, when considered under the circumstances of the individual

> case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

394 So.2d, at 1001.

Washington, supra, held that a petitioner alleging ineffectiveness of trial counsel must show that the acts or omissions of counsel created not only "a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage." (Emphasis supplied.) 693 F.2d 1258.

Having acknowledged the conflicting standards, however, it is Florida's position that under either approach the necessary demonstration of prejudice in the instant case is lacking. If this Court should address the conflict inherent in the decisions of Washington and Knight, such an analysis would necessarily be dicta in this case.

Quite to the contrary of the representations made in the petition for writ of certiorari, the state courts did not find that the petitioner's lawyer was totally unprepared for the trial of petitioner's case. The Florida Supreme Court stated that the four issues raised in petitioner's post-conviction motion were as follows:

> 1) Whether he was denied the right to counsel during pretrial preparations by the assignment of a non-lawyer to represent him.

2) Whether the trial court denied him effective assistance of counsel by refusing to appoint an attorney from outside the public defender's office.

3) Whether the denial of the motion for continuance made immediately before trial was prejudicial error which appellate counsel should have raised on appeal.

4) Whether specific acts and omissions, particularly the failure to take depositions, denied appellant the effective assistance of counsel.

See Aldridge v. State, 425 So.2d 1132, 1135 (Fla. 1982).

The Florida Supreme Court, in finding that the petition for post-conviction relief was properly denied, found:

1) That the part-time legal intern assigned to petitioner's case was merely assisting trial counsel, Elton Schwarz, and was not in charge of the preparation of a defense.

2) That petitioner was not denied effective assistance by the failure to appoint an attorney outside the public defender's office, and that petitioner acquiesced in the representation by the public defender Elton Schwarz.

3) Petitioner was not denied effective assistance by the failure of appellate counsel to raise the denial of the continuance at the trial level, since no specific evidence was demonstrated by petitioner which would show that counsel could have gathered more evidence or prepared more fully had the additional time been granted.

4) Under the last point of alleged ineffectiveness, the Florida Supreme Court stated:

> Although we agree that the failure to take depositions requires an inquiry, it does not necessarily follow that this conduct in itself necessitates a finding of

> ineffective assistance of counsel or prejudice to appellant. This is particularly so when defense counsel, as was the case here, had sworn statements from each of the witnesses who testified and there is no showing as to what other information would have been provided to defense counsel through the use of depositions.

Aldridge, at 1136.

The findings made by the state court are entitled to great deference. Sumner v. Mata, 449 U.S. 539 (1981); Marshall v. Lonberger, ____U.S._____, 51 U.S.L.W. 4113 (1983). Thus, when the Florida courts found that petitioner had produced no evidence which would show that he would have been better prepared by the taking of depositions below, it becomes clear that there is no prejudice shown under any standard.

Under the Washington v. Strickland standard, petitioner would have to show that counsel's failure worked to his actual disadvantage. The petitioner was afforded the opportunity to produce evidence at the state level to demonstrate that the failure to take depositions caused him some injury. He was unable to present any evidence of harm to his case.

Petitioner has cited this Court's recent acceptance of certiorari in United States v. Cronic, ____U.S._____, 51 U.S.L.W. 3598, and stated that the instant cause would provide "a helpful companion case." A reading of the Tenth Circuit's decision in Cronic, 675 F.2d 1126 (10th Cir. 1982), reveals that Cronic adopted the rule of per se prejudice in the examination of ineffectiveness

claims. This Court rejected such an approach in United States v. Morrison, 449 U.S. 361 (1981). Cronic, therefore, cannot be equated with the case now before this Court.

Petitioner cites United States v. Morrison, supra, and generally states that this Court has required some demonstration of prejudice from petitioner in order to prevail. Petitioner has overlooked many cases from this Court which have touched this issue. In Darcy v. Handy, 351 U.S. 454 (1956), this Court required a showing of prejudice as a "demonstrable reality." More recently in United States v. Frady, 456 U.S. 152 (1982), this Court stated:

> Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, inflicting his entire trial with error of constitutional dimension. [Emphasis supplied.]

456 U.S., at 170. The mere possibility that information might have helped the defense or might have affected the trial, does not establish the requisite prejudice. United States v. Agurs, 427 U.S. 97 (1976). See also Smith v. Phillips, 455 U.S. 209 (1982).

It is clear that this Court has long required a demonstration of prejudice far in excess of that offered by petitioner below. Regardless of which of the prejudice standards is applied, the fact is that petitioner has failed to present any evidence which would show that the alleged failures of counsel resulted

in any substantial harm to his trial. This Court should refrain from granting petitioner's prayer for relief.

ISSUE II

WHETHER PETITIONER'S ISSUE CONCERNING THE FLORIDA SUPREME COURT'S APPLICATION OF THE ELLEDGE RULE, CANNOT BE CONSIDERED BY THIS COURT FOR A FAILURE OF JURISDICTION.

Petitioner brings to this Court an issue never reviewed by the Florida Supreme Court below. Specifically, the issue concerning the Florida Supreme Court's affirmation of the death penalty found in 351 So.2d 942 (Fla. 1977). While the issue can be found in the motion for post-conviction relief, it was never considered because under Florida law it could not be.

Respondent submits, therefore, that this issue cannot be considered because of a lack of jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969); Webb v. Webb, 451 U.S. 493 (1981).

In Webb v. Webb, supra, this Court dismissed for want of jurisdiction a petition for certiorari where the record failed to disclose that the federal question was presented to the Georgia Supreme Court and disposed of by that court. This Court said:

> . . . it is a long settled rule that the jurisdiction of this court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. . . .

Id. at 496. See also: Cardinale v. Louisiana, supra, at 438 (writ dismissed for want of jurisdiction after briefing and oral argument where record showed issue not presented in a state court).

In support of respondent's position that Florida law would not allow the issue to be considered on a motion for post-conviction relief, respondent cites Foster v. State, 400 So.2d 1 (Fla. 1981). In Foster, the Florida Supreme Court defined the parameters of a motion for post-conviction relief under Fla.R.Cr.P. 3.850:

> . . . the motion to vacate under Fla.R.Cr.P. 3.850 must be directed to the judgment and sentence of the trial court. Under no interpretation of this rule can any action of the Florida Supreme Court be reviewed.

Id. at 4. Thus, the allegation in post-conviction relief was improperly raised and the Florida Supreme Court, in affirming the trial court's denial of relief, could not have ruled on the issue. The rule of Cardinale v. Louisiana, supra, and Webb v. Webb, supra, requires this Court to find a lack of jurisdiction.

CONCLUSION

Petitioner has totally failed to demonstrate that under any standard of prejudice, petitioner was entitled to relief on his claim of ineffective assistance of counsel. Additionally, petitioner has failed to demonstrate that this Court has jurisdiction to entertain the allegation that the Florida Supreme Court improperly upheld the death sentence imposed upon him.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 1983, a copy of this Brief in Opposition was mailed, postage prepaid, to Mr. Richard H. Burr, III, Assistant Public Defender, 224 Datura Street/13th Floor, West Palm Beach, Florida 33401. I further certify that all parties required to be served have been served.

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